Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT M. ADLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

When an attorney has been indicted for allegedly rendering a fraudulent written tax opinion, may the district court dismiss the indictment prior to trial if, as a matter of law, the attorney's opinion was correct or the pertinent law was so uncertain that it is impossible to infer that the attorney issued the opinion with fraudulent intent?

PARTIES

In the court of appeals, the parties were Robert M. Adler, Edward H. Heller, and the United States of America.

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OPINIONS BELOW

The March 2, 1989 decision of the United States Court of Appeals for the Eleventh Circuit is reported at 866 F.2d 1336 and is reprinted in the appendix hereto at 1a. The opinion of the United States District Court for the Southern District of Florida, issued on January 20, 1987, is not reported. It is reprinted in the appendix hereto at 20a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on March 2, 1989. Petitioner filed a timely petition for rehearing and suggestion of rehearing *en banc*. On April 10, 1989, the Eleventh Circuit entered an order denying the petition for rehearing and suggestion of rehearing *en banc*. This petition is filed within sixty days after the entry of that order.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Title 18, United States Code, Section 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more

than $1,000 or imprisoned not more than five years, or both.

Title 26, United States Code, Section 465 provides, in pertinent part:

> **(b) Amounts considered at risk.—**
>
> **(1) In general.**—For purposes of this section, a taxpayer shall be considered at risk for an activity with respect to amounts including—
>
> **(A)** the amount of money and the adjusted basis of other property contributed by the taxpayer to the activity, and
>
> **(B)** amounts borrowed with respect to such activity (as determined under paragraph (2)).
>
> **(2) Borrowed amounts.**— For purposes of this section, a taxpayer shall be considered at risk with respect to amounts borrowed for use in an activity to the extent that he—
>
> **(A)** is personally liable for the repayment of such amounts, or
>
> **(B)** has pledged property, other than property used in such activity, as security for such borrowed amount (to the extent of the net fair market value of the taxpayer's interest in such property).

No property shall be taken into account as security if such property is directly or indirectly financed by indebtedness which is secured by property described in paragraph (1).

> **(3) Certain borrowed amounts excluded.—**
>
> **(A) In general.**—Except to the extent provided in regulations, for purposes of paragraph (1)(B), amounts borrowed shall not be considered to be

at risk with respect to an activity if such amounts are borrowed from any person who has an interest in such activity or from a related person to a person (other than the taxpayer) having such an interest.

(B) Exceptions.—

(i) Interest as creditor.—Subparagraph (A) shall not apply to an interest as a creditor in the activity.

(ii) Interest as shareholder with respect to amounts borrowed by corporation.—In the case of amounts borrowed by a corporation from a shareholder, subparagraph (A) shall not apply to an interest as a shareholder.

(C) Related person.—For purposes of this subsection, a person (hereinafter in this paragraph referred to as the "related person") is related to any person if—

(i) the related person bears a relationship to such person specified in section 267(b) or section 707(b)(1), or

(ii) the related person and such person are engaged in trades or business under common control (within the meaning of subsections (a) and (b) of section 52).

For purposes of clause (i), in applying section 267(b) or 707(b)(1), "10 percent" shall be substituted for "50 percent".

(4) Exception.—Notwithstanding any other provision of this section, a taxpayer shall not be considered at risk with respect to amounts protected against loss through nonrecourse financing, guarantees, stop loss agreements, or other similar arrangements.

Rule 12(b) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> **(b) Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.

STATEMENT OF THE CASE

Petitioner Robert M. Adler is an attorney. He is now and was at the time of the events relevant to this indictment (1976-1979) engaged in the private practice of law in the District of Columbia.

The indictment, returned in the United States District Court for the Southern District of Florida, charged Mr. Adler with five counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, and charged a codefendant, Edward H. Heller, in those counts and six additional ones.

Mr. Adler had served as one of several tax counsel to limited partnerships offered to the public by Mr. Heller from 1976 to 1979. Mr. Adler was retained to opine on the tax consequences of the investments and his opinions were published in the offering circulars. He was not a promoter or owner and his firm's fees were based upon its normal charges for such matters. Insofar as Mr. Adler was concerned, the indictment alleged that he fraudulently represented in his opinions that the limited partners could claim tax deductions greater than the amount of their actual investment, Indictment ¶ 10, and it alleged that the financing for these partnerships was "false" or "fictitious." Indictment ¶¶ 20-32.[1]

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[1]The basis for the allegations against Mr. Adler was solely his involvement in the financing for the partnerships. Mr. Hardy, one of the prosecutors, said on November 8, 1984:

The partnerships, which were controlled and managed by Mr. Heller, were established to engage in the business of purchasing horticultural products — plants — that were eventually to be resold for profit. The limited partnerships were to make purchases of plants in the first year in an amount of cash equal to twice the amount of cash invested by the limited partners. The partnerships borrowed from banks to finance the balance of the funds necessary. The limited partners signed recourse notes payable to the partnerships in amounts equal to the partnerships' borrowing. Because the partnerships were not expected to resell any plants in the initial year of operations, each partnership anticipated reporting a loss for that year equivalent to the total amount expended for the purchase of plants, including both invested and borrowed funds. The loss was to be apportioned and passed through to the limited partners so that each limited partner could claim a deduction equivalent to twice his cash payment to the partnership.

> Mr. Adler is charged with one phase of this scheme; that is, the financing. That was alleged to be false financing.
>
> . . .
>
> That essentially is the case against Mr. Adler, in a sense that it involves the financing. We have codefendants here. And the situation, I think, there [sic] we're dealing with is that Mr. Heller's role as the indictment alleges is a larger role, involving other things which Mr. Adler is not mentioned as having participated in.

R11-76-17-18.

Although the indictment charges that aspects of the investments other than the financing were fraudulent, it does not assert that Mr. Adler was aware of or participated in them. *See* Indictment ¶¶ 18-19, 34-38 (charging that defendant Heller "directed Island Foliage falsely and fraudulently to create fictitious contracts that claimed to purchase horticultural products from independent growers" and concealed from investors that "the partnerships' purchases and sales of products were largely fictitious"); *see also* Government's Response to Government's Show Cause Order Entered on April 24, 1986, R7-172-1 ("there is no proof that defendant Adler knew of the Island Foliage scheme with certain contract growers to create bogus plant purchases by Island Foliage").

Limited partnership investments of this type were offered to the public by Mr. Heller annually from 1976 to 1979. Loans for the limited partnerships in 1976 and 1977 were provided by the Dania Bank in Dania, Florida. For 1978 and 1979, loans were obtained from the Clariden Bank in Zurich, Switzerland. It is Mr. Adler's opinion on the Clariden financing that the indictment attacks as criminal.

In both the Dania and Clariden financing arrangements, the loan proceeds were pledged or deposited back to the banks, a type of financing variously described as "circular" or "back-to-back." In 1976 and 1977, when funds were borrowed from Dania, the partnerships used these funds, along with the investors' funds, to buy plants from an entity called Island Foliage. Island Foliage pledged the amount of the borrowed funds back to Dania in the form of certificates of deposit to secure the limited partnership borrowing.[2]

In 1978 and 1979, when loans were obtained from the Clariden Bank, the loans were made first to an entity called Fin Serve. The limited partnerships borrowed the funds from Fin Serve and, as in 1976 and 1977, used them to purchase plants from Island Foliage. Just as with the Dania transactions, Island Foliage deposited the funds at the lending bank (Clariden), this time in a blocked account.

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[2]Legal opinions were prepared for the limited partnership offerings by a number of highly respected law firms with whom Mr. Adler had no connection, including Baker & McKenzie, Irell & Manella, and Bronson, Bronson & McKinnon. These opinions described the contemplated back-to-back financing and after noting the possible tax risks, concluded, in language almost identical to that used by Mr. Adler in his tax opinions, that there was a reasonable basis to claim deductions arising from the circular Dania financing. Copies of the Dania opinions appear in the record as part of Adler Hearing Exhibit No. 8. *See also* Letter of Joseph Rudovsky, formerly with Bronson, Bronson and McKinnon, stating that he believed the financing permitted deductions "more likely than not." Adler Hearing Exhibit No. 8.

The government never contended that the Dania financing was fraudulent or fictitious. The Tax Division of the United States Department of Justice determined that there was confusion in the area and that the back-to-back loans were "arguably legal." An internal Tax Division memorandum produced by the government in response to a motion filed by Mr. Adler for discovery of exculpatory evidence stated:

> I think we should contend that the shelters as envisioned in 1976, while based on somewhat questionable financing, were at least arguably legal. That is to say I think that the financing scheme outlined in the prospectus, while highly suspect, is arguably legal. There certainly seems to be enough confusion over this point that I do not think we should argue this particular financing scheme is illegal. Incidentally, this approach will effectively eliminate Robert Adler as a defendant. The only alleged fraud involving Mr. Adler is his legal opinion approving of the financing scheme.[3]

The financing transactions with Clariden Bank consisted of two separate agreements, one called a Fiduciary Loan Agreement between Clariden Bank and Island Foliage, and one called a Loan Agreement between Clariden Bank and Fin Serve. In the Fiduciary Loan Agreement, the bank agreed with its depositor, Island Foliage, to make a loan to a third party and to hold funds of the depositor in an amount equal to the loan in a blocked account. In the separate Loan Agreement,

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[3]The sections of the Tax Division's memorandum that were disclosed by the government were made part of the record in this case by an Order of the Eleventh Circuit entered on September 8, 1988, granting appellee Adler's Motion to Supplement the Record on Appeal. Although the memorandum specifically references the 1976 partnerships, the Tax Division's review included the back-to-back financing in all years. The Tax Division declined to bring tax charges against Mr. Adler based upon either the Dania or Clariden financing.

Clariden agreed to make a loan to its borrower, Fin Serve, and the borrower agreed to repay it with interest. Both agreements provided that they were to be construed in accordance with and governed by Swiss law.

In his tax opinions Mr. Adler concluded that there was a reasonable basis upon which to claim deductions from the contemplated Clariden financing. He believed it to be indistinguishable from the Dania financing for tax purposes. The opinions included an extensive discussion of the potential tax risks of the proposed financing. Mr. Adler specifically disclosed and analyzed a number of theories upon which the Internal Revenue Service might disallow deductions, including the relationships between the parties and substance versus form.[4] App. 40a-41a. The opinions disclosed the back-to-back nature of the loans and analyzed the borrowings permissible under the "at risk" concept which had appeared in the 1976 Tax Reform Act. App. 38a-40a.

The Tax Reform Act of 1976 had radically altered the taxation of limited partnerships used as tax shelter vehicles. Section 465(b)(1)(B) of the Code, as amended, permitted an investor to be "at risk" for "amounts borrowed with respect to such activity." There was no further definition in the statute of what constituted a "borrowed amount," nor was there any suggestion that a bank loan secured by its own proceeds was not an "amount borrowed." The strong inference was that a loan, valid under local law, would be recognized as an "amount borrowed" under Section 465. No revenue rulings or judicial interpretations on the "borrowed amount" question were issued until 1979.

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[4]The relevant portion of Mr. Adler's tax opinions and "Tax Risk Factors" is reprinted in the appendix hereto at 34a. The entire opinion appears in the record as part of Adler Hearing Exhibit No. 8.

"Temporary Regulations" were issued under Section 465 on August 19, 1977. *See* Temporary Regulations Sections 7.465-1 to 7.465.5. They did not deal with the borrowings which would or would not be recognized under Section 465.

It was not until June 5, 1979, that "Proposed Regulations" were issued interpreting the meaning of "borrowed amounts." Although detailed in scope, they did little to resolve the uncertainty as to whether the circular loans would be recognized for U.S. tax purposes. Proposed Treasury Regulation Section 1.465-1(b) provided that a taxpayer's "amount at risk will not be increased if the transaction is inconsistent with normal commercial practices or is, in essence, a device to avoid Section 465." No definition of "normal commercial practice" was given. The examples given under Proposed Regulation Section 1.465-4 as to when there is an "attempt to avoid the at risk provisions" suggested that the targeted practices were mainly those in which the amount "at risk" is increased at year end with a decrease in this amount at the beginning of the next taxable year. While other portions of the Proposed Treasury Regulations referred to "loans" and "borrower," they did not provide any further definition or limitation on what type of bank loan would nonetheless not be recognized for tax purposes. *See* Proposed Treasury Regulations Sections 1.465-(8)(b)(1) and 1.465-24.

By letter dated December 12, 1979, Mr. Adler amended his tax opinions issued during that year.[5] Therein, he disclosed and analyzed these Proposed Regulations and the effect they might have on the proposed back-to-back loans. In particular, he informed the investors that relying on the propos-

[5]The December 12, 1979 letter is reprinted in the appendix hereto at 44a. It appears in the record as Exhibit P to the Memorandum in Support of Defendant Robert M. Adler's Motion to Dismiss the Indictment.

ed regulations, the Internal Revenue Service could challenge the contemplated back-to-back financing, arguing that: (1) the loan transaction was "inconsistent with normal commercial practices"; (2) the loan was a device to avoid Section 465; and (3) the loan was not incurred in the conduct of a partnership activity since its proceeds were pledged as security on the loan and not used in a farming activity.

The net effect of the Tax Reform Act and these proposed regulations was that while "amounts borrowed" would generally be recognized for tax purposes, the law was unclear as to whether, and if so, on what grounds, the Internal Revenue Service could challenge these borrowings under either this Act or any other provision of the Internal Revenue Code.

The government repeatedly told the magistrate and the district court that the mail fraud charges against Mr. Adler were not based on his analysis of the tax consequences of the transactions but on his concealment of the alleged feature of the Clariden transactions which made them different from the Dania loans; that is, that they were not made by a bank.[6] In its opening brief in the district court, for example, the government wrote that the grand jury did not indict Mr. Adler "based on the accuracy of his analysis of the disclosed tax risks, but on his concealment of the material fact that in 1978 and 1979 Island Foliage was the source of the loan funds and it had no funds to lend." Government's Memorandum in Opposition to Defendants' Several Pending Motions, R4-72-36. For most of the litigation in the district court, the government carefully denied any interest in the tax treatment of this financing because of its back-to-back nature and portrayed the case

[6]The government undoubtedly took this position because of the Tax Division's declination to bring tax charges.

as a simple matter of factual concealment. The prosecutor told the magistrate on September 23, 1985:

> It's a question of fact for the jury. Was there money in the wheel?

R-16-134-32. The magistrate then inquired directly.

> The Court: The government's position is that loan proceeds were [n]ever generated.
>
> Mr. Klein: There was no money —
>
> The Court: There was no money.
>
> Mr. Klein: — in the wheel.

R-16-134-46-47.

Mr. Adler moved to dismiss the indictment and proceeded to establish before the district court that, as a matter of law, the Clariden financing was functionally identical to the Dania financing and that it produced real, not fictitious funds. Because this issue was exclusively one of law, and indeed foreign law, it could be heard and decided under Rule 12(b) of the Federal Rules of Criminal Procedure prior to trial. The district court held a hearing at which it heard testimony of experts and reviewed the loan documents and written submissions.

Dr. Peter Nobel, a professor of commercial law, a judge on the Court of Appeals in Zurich, and the author of a widely used treatise on Swiss banking law, R17-232-(l-23-25), testified that Swiss law was applicable to the fiduciary loan transactions and that, under Swiss law, Clariden Bank had made a genuine loan of its own funds to Fin Serve. R17-232-(l-28-30). Clariden made a funded loan by giving a credit to Fin Serve, since "a credit in a bank account is considered to be money under Swiss law." R17-232-(l-34). Dr. Nobel testified that the check Clariden wrote to Fin Serve in 1979 was enforceable

against the general assets of the bank and was "as good as money." R17-232-(l-83). Under Swiss law, the loan was fully funded by Clariden Bank and the funds withdrawn by Fin Serve. R17-232-(l-28-30, 33-34, 94, 98-99).

Dr. Nobel explained in his written opinion the proper interpretation of the Swiss loan documents. He said:

> The loan agreements between Clariden and Fin Serve ... are independent agreements not conditioned by the fiduciary agreements between Clariden and Island Foliage. The Clariden Bank was obligated to pay out the loan sum, regardless of a contemplated coverage through a deposit of funds by Island Foliage or the posting of any collateral, and/or whether the fiduciary agreements were valid and enforceable.
>
> Because Fin Serve and Clariden had the customary rights and obligations of a debtor-creditor relationship, Fin Serve could have enforced the loan agreements separately against the assets of Clariden.

Adler Hearing Exhibit No. 2 at 3-4; *see also* R17-232-(l-33) (if Clariden had refused to make a loan to Fin Serve, Fin Serve could have brought an action against Clariden to enforce its rights under the Loan Agreement).

Dr. Nobel testified that under Swiss statutes and court decisions, the Fiduciary Loan Agreement did not create any legal relationship between Island Foliage and Fin Serve. R17-232-(l-31). He carefully explained that, despite the reference to Island Foliage as the "Principal" in the Fiduciary Loan Agreement, Swiss law holds that "in fiduciary transactions, the law of agency is purposely excluded and ... the bank has no power to act as an agent for the ... principal." R17-232-(l-32).

Adler then introduced the testimony of two American banking law experts who testified as to the effect of the loan clos-

ing procedures. Gilbert T. Schwartz, a former associate general counsel of the Federal Reserve Board, testified that "real money" was transferred from Clariden Bank to Fin Serve when the Florida bank at which the closing occurred debited funds from Clariden's account and credited those funds to Fin Serve's account. R17-232-(I-102-03, 110, 113). Mr. Schwartz explained that large amounts of money are not generally transferred using cash. R17-232-(I-104-05). Instead, "typically money is moved around by debits and credits to accounts under United States banking law and practice." R17-232-(I-104). Mr. Schwartz testified that Clariden could transfer real funds to Fin Serve because the Florida bank had entered a credit in Clariden's account as a result of the check from Island Foliage. R17-232(1-104-05, 110).

The other American banking law expert was Hal S. Scott, a professor at the Harvard Law School who had served as a reporter to the committee charged with revising the banking sections of the Uniform Commercial Code. R17-232-(I-113-15). Mr. Scott agreed with Mr. Schwartz that real money passed from Clariden Bank to Fin Serve during the Florida loan closing transactions and that when the Florida bank credited Clariden's account on the basis of the check from Island Foliage, "[a]t that point, the 27.5 million is Clariden's money." R17-232-(I-117).[7]

Mr. Adler then called two experts in American tax law, Robert Klayman, a partner in the Washington, D.C. firm of Caplin and Drysdale,[8] and former Internal Revenue Service

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[7]The banking experts also prepared extensive written opinions, which were introduced into evidence at the hearing as Adler Hearing Exhibits No. 2, No. 3, No. 4, and No. 5.

[8]Before entering private practice, Mr. Klayman was formerly in the office of Chief Counsel of the Internal Revenue Service and was Associate Tax Legislative Counsel of the United States Treasury. R17-232-(1-167-68).

Commissioner Sheldon Cohen. Klayman and Cohen both confirmed that in order to determine whether Clariden made a real loan, American tax law would require examination of the rights and obligations of the parties under Swiss law, R17-232-(1-170-71); R17-232-(1-232), a proposition which appears clearly from relevant authority.[9] They said that since Swiss law, as explained by Dr. Nobel, left no doubt that Clariden was legally obligated to and did make the loans, and Fin Serve was obligated to pay them back, American tax law would hold, contrary to the allegations in the indictment, that the loan proceeds were not "fictitious." R17-232-(1-191, 201-02); R17-232-(1-233, 245).

Klayman said that the Clariden financing was functionally indistinguishable from the Dania financing. R17-232-(1-176). Cohen agreed, saying that Mr. Adler's opinion concerning the tax consequences of the Clariden financing was a "reasonable basis opinion I or other tax lawyers of similar qualifications could have given . . . and probably would have." R17-232-(1-240).

The government presented the testimony of one witness, an Internal Revenue Service attorney, who testified that "in substance there was no loan here for tax purposes that could justify the deductions claimed, and [Mr. Adler] had no reasonable basis whatsoever for giving an opinion that such deductions could be claimed." R18-233-(2-311).

After the hearing, the district court dismissed the indictment against Mr. Adler and struck portions of it against Mr. Heller. The court stated two independent grounds for the dismissal. First, it held as a matter of law that "a real loan was made from Clariden Bank to Fin Serve and therefore the

[9] *United States v. Mitchell*, 403 U.S. 190, 197 (1971); *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960); *United States v. Bess*, 357 U.S. 51 (1958).

borrowed funds were not fraudulent and fictitious as charged in the indictment." App. 28a. Second, the court held that the tax consequences of the Clariden financing transactions were at a minimum sufficiently uncertain that, as a matter of law, the government could not prove that Mr. Adler acted with fraudulent intent. The district court noted that "there are no I.R.S. opinions or case law which held that the circular loans at issue are not valid for tax purposes," App. 31a, and that "what we have here is, at best, a disagreement among experts as to what treatment the loan should have received." App. 30a-31a. The court concluded that the uncertainty in the law regarding the proper tax treatment of the Clariden loans required dismissal of the indictment: "In this nation, a man simply cannot be indicted for a difference of opinion." App. 31a.

On the government's appeal pursuant to 18 U.S.C. § 3731, it urged that the district court's decision be reversed because the indictment charged that the loans were fictitious "for purposes of U.S. tax law," Brief for the United States at 28, and that notwithstanding the district court's conclusion of law that they were real, a jury could conclude that they were a sham.[10] The court of appeals essentially agreed with the government. It vacated the order of the district court and ordered that the indictment be reinstated in full. It declined to review the district court's determination that, as a matter of law, Clariden had made a genuine loan of real funds to Fin Serve. According to the court of appeals, the district court's conclusion of law was irrelevant because, even assuming the correctness of that conclusion, the jury could still find that Adler had acted fraudulently if it found that his representation that investors could take deductions was "baseless." App. 10a.

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[10]This contention is, of course, fundamentally inconsistent with the government's earlier representation that it was a simple question of whether there was "money in the wheel." *See supra* at 12.

The Eleventh Circuit also rejected the district court's determination that the law governing the tax consequences of the Clariden financing was too uncertain to permit a finding that Mr. Adler had acted with fraudulent intent. The court noted that the rule prohibiting "sham transactions for tax avoidance is quite well-settled," but that the government must still prove that the defendants "evidenced an intent to engage in a transaction within the prohibition." App. 14a. It held that the district court erred, however, in concluding that the "*absence* of an official statement *prohibiting* behavior identical to the [defendants']," along with the opinions of expert witnesses, was sufficient to establish legal uncertainty. App. 14a-15a (emphasis in original).

REASONS FOR GRANTING THE WRIT

This case presents the question whether a district court may dismiss an indictment charging that an attorney's written opinion on a tax question is fraudulent when the court concludes as a matter of law either that (a) the attorney's legal opinion was correct, or (b) the question was so uncertain that fraudulent intent may not be inferred. The Eleventh Circuit has determined that, regardless of the district court's conclusion as to the state of the law at the time of the attorney's written opinion, the jury may decide that the attorney's opinion as to the tax result was "baseless." App. 10a. In so holding, the court below ignored the responsibility of the district judge to decide in the first instance the legal question upon which the allegation of tax fraud depends.[11] Even if the

[11]Under Rule 12(b) of the Federal Rules of Criminal Procedure, "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." A defense is properly presented in a pretrial motion to dismiss if "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60 (1969). In this case, the facts concerning

district court concludes that a tax lawyer's opinion is a reasonable application of unsettled principles to a specific transaction, the court holds that in the absence of a court decision or "authoritative statement," the case must go to the jury.

This Court should grant a writ of *certiorari* to review the judgment of the Eleventh Circuit. As we demonstrate below, the circuits which have addressed this issue have done so in an inconsistent and confused manner. If this decision is permitted to stand, no matter how compelling the legal conclusion that a defendant accused of fraud relating to tax law was right, or that the law was uncertain, the district court may not protect him or her from the vagaries of a jury trial.

1. The decision of the Eleventh Circuit in this case is flatly inconsistent with the decision of the Fourth Circuit in *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), in which the court held that legal uncertainty is a question of law for the court, and that the absence of controlling authority established legal uncertainty as a matter of law. It is also inconsistent with the holding of the former Fifth Circuit sitting en banc in *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc), in which the court held that no authoritative pronouncement was necessary to establish legal uncertainty. *Garber* is itself inconsistent with *Mallas* in holding that the jury should decide questions of taxability and legal uncertainty.

The Eleventh Circuit's decision contributes to the growing confusion in the circuits when criminal prosecutions are based on the allegation that the position taken by a defendant on a question of federal tax law is so clearly wrong as to be

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the financing transactions at issue are not in dispute. Having determined that the applicable law was too uncertain to permit a finding of fraudulent intent, the district court was required to dismiss the indictment.

fraudulent. The courts of appeals have adopted inconsistent approaches with respect to the proper roles of the court and of the jury, both in deciding disputed questions of tax law and in determining whether the relevant law is so uncertain as to preclude a finding that the defendant acted with criminal intent. In addition, the circuits have differed sharply on the nature of the evidence required to establish legal uncertainty.

Much of the confusion in this area originates in the decision of the Fifth Circuit in *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc). The defendant in *Garber* was convicted of tax evasion for failing to report as income payments for her blood plasma, which contained a rare and valuable antibody. The Fifth Circuit reversed Garber's conviction and remanded the case for retrial. As in this case, the *Garber* court held that both the correctness of the government's interpretation of the tax law and the existence of legal uncertainty were questions to be decided by the jury.

The district court in *Garber* ruled as a matter of law that the payments the defendant received for her plasma were taxable income and instructed the jury accordingly. *Id.* at 96. The Fifth Circuit held that the trial court's instructions improperly "took from [the jury] the question of the validity of the tax." *Id.* at 99. This error was compounded, according to the court of appeals, by the trial court's exclusion of expert testimony that the money Garber received from the sale of her plasma was not taxable income, and by its refusal to instruct the jury that a reasonable misconception of the tax law on the part of the defendant would negate the necessary intent. *Id.* The effect of the trial court's errors was to deny the defendant the opportunity to present the defense of legal uncertainty to the jury. *Id.* at 97.

In *Garber*, as in this case, the tax question at issue was "unsettled by any clearly relevant precedent." *Id.* at 100.

Unlike the position taken by the Eleventh Circuit in this case, however, *Garber* held that the *absence* of any controlling legal authority strengthened the defendant's argument that she lacked the necessary criminal intent:

> In the case presently before us, as conceded by all the experts who testified, there is a dearth of authority directly supporting either argument. However, the fact that the question has never before evoked anything more than theories on either side adds to rather than detracts from the critical conflict upon which defendant's criminal liability hinges. Neither position is frivolous, and the fact that both are without clear precedential support in law demonstrates that the court should not have restricted the evidence or instructed as it did.

Id. at 99.

The dissenting judges in *Garber* believed that the court, not the jury, should decide questions of taxability and legal uncertainty. Judge Tjoflat, in an opinion joined by Judge Ainsworth and Judge Rubin, explained that the majority's analysis improperly confused the legal questions whether the payments Garber received were subject to federal income taxation, and if so, whether the obligation to pay taxes on the funds was sufficiently clear to support a criminal prosecution, with the factual question whether Garber had an honest belief that the money she received was nontaxable. *Id.* at 109 (Tjoflat, J., dissenting). The dissenting judges pointed out that if the trial judge had determined that the money Garber received was not taxable income, "he would have had no choice but to dismiss the indictment under Fed. R. Crim. P. 12(b)(2) for failure to charge an offense." *Id.* at 110 (Tjoflat, J., dissenting); *see id.* at 101 (Ainsworth, J., dissenting) (if "it is the majority's real view that the income was not taxable ... the opinion should say so and dismiss the indictment"). Similar-

ly, if the district court had concluded that the taxability of the payments was too unclear to support criminal liability, "the proper disposition of the case would, again, have been to have dismissed the indictment under Rule 12(b)(2)." *Id.* at 111 (Tjoflat, J., dissenting). Judge Tjoflat noted the inconsistency between the majority's analysis and its decision to remand the case for a new trial:

> The majority's mysterious refusal to follow the logic of its reasoning and dismiss the indictment leads to certain inconsistencies. The opinion ... ends with the observation that "[a] criminal proceeding pursuant to section 7201 is an inappropriate vehicle for pioneering interpretations of tax law." *Ante* at 100. This conclusion ... is blatantly inconsistent with the court's decision that there should be a ***new*** "criminal proceeding" that will allow the jury to hear evidence concerning the certainty of the tax laws.

Id. at 112 (Tjoflat, J., dissenting) (emphasis in original).

The Fourth Circuit holds that legal uncertainty in matters of tax law is a question of law to be decided by the court. *See United States v. Mallas*, 762 F.2d 361, 364 n.4 (4th Cir. 1985) ("The uncertainty of a tax law, like all questions of vagueness, is decided by the court as an issue of law.").

In *Mallas*, the defendants were convicted of tax evasion and conspiracy to defraud the United States based on their involvement in designing and promoting a tax shelter plan. Under that program, investors subleased coal mining rights from Trinity Properties, Inc. ("Trinity"), a corporation formed by one of the defendants as part of the tax shelter program. *Id.* at 362. Trinity itself subleased the coal rights from a second corporation, which actually leased the coal-producing property. *Id.* The investors in the program contracted to pay Trinity an advance minimum royalty during each year of the four-year lease

period. In return, Trinity warranted that there was sufficient coal in the leased property to permit each investor to recoup his advance minimum royalties or that, if the coal reserves proved to be inadequate, it would supplement the lease with other property that would allow for complete recoupment. *Id.* The defendants represented to investors that through a complicated sequence of financing transactions, each investor would be able to claim a tax deduction of $3.50 for every $1.00 invested. *Id.*

The government maintained, however, that the annual minimum royalties were not deductible and that the tax shelter program was merely a scheme to evade federal income taxes. *Id.* The government argued that under Treasury Regulation § 1.612-3(b) deductions were authorized only if Trinity, at the beginning of each lease, committed to the leasing investor enough coal-producing property to recoup all of the annual advance minimum royalties due over the full four years of the lease. *Id.* The defendants took the position that the regulation required Trinity to have sufficient coal to permit recoupment of the minimum royalty payments only at the time each annual payment became due.

Like the court in *Garber*, the *Mallas* court viewed the absence of any directly relevant legal authority as evidence supporting the defendants' lack of criminal intent. The court noted that the applicable regulation did not explicitly resolve the issue of the deductibility of advance minimum royalties and that both the prosecution and the defense could advance "reasonable and well-supported" readings of that regulation. *Id.* at 364. Because the pertinent legal question had not been addressed by "any other regulation, judicial decision, or even revenue ruling," the Fourth Circuit concluded that "[t]he traditional sources of notice for potential defendants are simply silent — and hence ambiguous — on this subject." *Id.* Unlike

Garber, however, the court held as a matter of law that the law governing the defendants' tax liability was so uncertain that their convictions must be reversed. *Id.* at 365.

Other circuits that have addressed the issue have agreed that uncertainty in questions of tax law must be decided by the court. *See United States v. Curtis*, 782 F.2d 593, 599-600 (6th Cir. 1986) (*Garber* improperly "requires the jury to assume part of the judge's responsibility to rule on questions of law"); *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) (reversing convictions for tax evasion where "the legality of the tax shelter program advocated by [the defendants] was completely unsettled by any clearly relevant precedent"), *cert. denied*, 466 U.S. 980 (1984); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 96-97 (2d Cir.) (indictment must be dismissed if court determines as a matter of law that the tax law is uncertain), *cert. denied*, 462 U.S. 1131 (1983). As the Sixth Circuit explained in *Curtis*, asking the jury to "determine whether or not the governing law is uncertain or debatable" encroaches on the traditional role of the court in deciding questions of law and requires jurors to resolve issues that are beyond their competence:

> The jury is not composed of lawyers; the typical juror is untrained in legal affairs. To attempt to explain the myriad rules of judicial construction, the complexity of legal principles, or the function of precedent would hopelessly divert the jury from their preeminent duty of assessing [the defendant's] guilt.

782 F.2d at 600 (quoting *Garber*, 607 F.2d at 105 (Ainsworth, J., dissenting)).

The decision below aligns the Eleventh Circuit with the Fifth Circuit's notion, expressed in *Garber*, that the court should not take from the jury "the question of the validity of the tax." 607 F.2d at 99. It clearly intends that the jury will attempt

to divine the meaning of the relevant loan agreements, App. 10a-12a, and whether Adler's opinion that they provided a reasonable basis to claim deductions was "baseless." App. 10a.

The panel ends its discussion of the taxability issue with the observation that—

> If *for the purposes of the relevant federal tax law* (emphasis added) Fin Serve and the partnerships left the table having borrowed no money at all but Heller and Adler fraudulently had represented the contrary, a jury could find that Clariden and Fin Serve *loaned* (emphasis in original) "fictitious funds" in spite of their choreographed transfers of "real" money.

App. 12a-13a.

We are at a loss to understand how, if Clariden transferred real money to the partnerships, a jury could conclude that the loans were fictitious. It is clear, however, that the Eleventh Circuit expects the jury to decide how the relevant federal tax law would treat the transaction, and that is a seriously misguided notion. This Court should review the decision and reverse it.

2. The issue here has broad-scale ramifications. The decision below puts at risk every tax lawyer who attempts in good faith to advise on questions of taxability when, as in many cases, there is no controlling authority and the state of the law is uncertain. It holds that juries, not judges, must decide tax law issues which have criminal consequences, even when the state of the law is uncertain and when, as in this case, the Tax Division of the Department of Justice says that the law is uncertain. Under the rule adopted below, unless the lawyer has a court decision or revenue ruling dispositive of the question, the court cannot decide if his analysis was reasonable, or even right, if the prosecutor calls it fraud.

It is no answer that prosecutors act with discretion. Responsible lawyers, whether they practice in Florida or Maine, must recognize that this case holds that they opine on difficult and uncertain questions at their peril.

The issue thus goes to the heart of the ability of lawyers to practice their profession. For it is precisely in areas of uncertainty where lawyers are called upon to exercise the reasoning and judgment that are the essence of the practice of law. Where an accused lawyer can demonstrate to the trial court that the governing law was indeed uncertain on the matter as to which his advice was given, the trial court must have the ability to spare the lawyer from the second-guessing of a jury unschooled in the law.

CONCLUSION

For the reasons set forth herein, petitioner respectfully requests that this Court issue a writ of *certiorari* to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellant,

v.

Edward H. HELLER and Robert M. ADLER,
Defendants-Appellees.

No. 87-5105.

United States Court of Appeals,
Eleventh Circuit.

March 2, 1989.

Appeal from the United States District
Court for the Southern District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and LYNNE*, Senior District Judge.

KRAVITCH, Circuit Judge:

The government charged appellees Edward H. Heller and Robert M. Adler with having devised and implemented fraudulent tax shelters. A grand jury indicted Heller, the promoter, and Adler, a lawyer alleged to have given misleading advice in connection with the shelters, on five counts of mail fraud (18 U.S.C. § 1341) (counts one through five). Heller was also indicted on four counts of transporting fraudulently obtained property through interstate commerce (18 U.S.C. § 2314) (counts six through nine),[1] and on two counts of making false

*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1]Counts 1-9 also carried an aiding-and-abetting charge (18 U.S.C. § 2).

statements on his income-tax returns (26 U.S.C. § 7206(1)) (counts ten and eleven). Both appellees moved to dismiss the indictment pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, and after an evidentiary hearing, the district court struck portions of the indictment against Heller and dismissed the entire indictment against Adler. On the government's petition for interlocutory review pursuant to 18 U.S.C. § 3731, we reverse.

I.

Heller and Adler designed a series of limited partnerships which, if they functioned as represented, would have generated tax deductions for the limited partners in excess of any cash contributions a limited partner made to his partnership.[2] This appealing result, referred to by the government as a "two for one" loss, was accomplished by a byzantine financial transaction the workings of which are largely undisputed. Simply stated, the plan was supposed to have worked as follows: Heller would create a series of limited partnerships for the ostensible purpose of buying and selling shrubbery. The general partner of each limited partnership was a corporation under Heller's control. To fund the partnerships, each limited partner would contribute cash and promissory notes. The basis of a limited partner's interest in his partnership would be his cash contribution; the value of any promissory notes would not be included in basis.

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[2]We take the government's allegations in the indictment to be true; we are only concerned with whether the indictment charges an offense. *United States v. Mann*, 517 F.2d 259, 266 (5th Cir. 1975) (binding authority in the Eleventh Circuit through *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(in banc)), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976). In particular, we intimate no opinion whether Heller or Adler made false representations with fraudulent intent; these are questions to be resolved at trial. *Mann*, 517 F.2d at 267.

To avoid the rule excluding the promissory notes from basis, Fin Serve (another entity under Heller's control) would loan to each partnership cash equal to the amount of any promissory notes that had been contributed to that partnership. The promissory notes from the limited partners served as collateral for this loan from Fin Serve. Each limited partner's basis in his partnership interest would then increase by his pro rate share of the partnership's obligation to repay Fin Serve. Thus, at the close of this stage of the scenario the partnerships had cash on hand equal to the total cash contributions plus the value of the promissory notes, and each limited partner had a basis in his partnership equal to the amount of his cash contribution plus any promissory note he had contributed to the partnership.

The partnerships would then use this cash to purchase commitments for shrubbery from Island Foliage, a shrubbery broker (and yet another entity under Heller's control).[3] The partnerships would book this transaction as a cash disbursal and partnership business expense, and each limited partner would be able to deduct his pro rata share of the expenses. Because the loan from Fin Serve corresponded to the limited partners' promissory notes, each limited partner would thus be able to deduct an amount equal to his cash contributions plus any promissory note he contributed to his partnership. For example, if a limited partner contributed one dollar in cash and a one dollar promissory note, he would be able to deduct two dollars as his share of the partnership's business expense. The partnerships would not receive or resell the shrubbery until the next tax year, and therefore would generate no income to offset the expense of purchasing the shrubbery commitments.

[3]Adler's analysis of the tax risks failed to note that Heller controlled not only the general partners, but also Fin Serve and Island Foliage.

Thus seen, Heller and Adler devised an intricate plan to inflate each limited partner's basis in his partnership interest, thereby increasing the share of deductions each could take on his individual income-tax return. Yet the validity of the deductions depends upon the Fin Serve loans: if those loans lacked economic substance, the corresponding increases in basis and individual deductions would not be respected for tax purposes.

Clariden, a Swiss bank, loaned the cash to Fin Serve that Fin Serve loaned to the partnerships. This loan, however, was backed by a corresponding deposit Island Foliage made with Clariden (albeit with a worthless check).[4] The arrangement between Clariden and Island Foliage is called a "fiduciary loan." A fiduciary loan is a Swiss practice in which the bank (Clariden) agrees with a principal (Island Foliage) to loan funds to a specified third party (Fin Serve). The fiduciary-loan agreement between Clariden and Island Foliage provided:

> *Article 2*
>
> It is agreed that Clariden shall only be obligated to grant the loan provided that the amount of the loan be put at its disposal by the Principal, such amount being credited to a fiduciary account which shall remain blocked for the duration of the loan. . . .
>
> *Article 3*
>
> It is understood that Clariden shall grant the loan in its own name, but in a fiduciary capacity for the exclusive account and risk of the Principal. In par-

[4]Appellees and the district court attach some significance to the fact that Island Foliage gave a worthless check to Clariden as collateral for the Clariden-Fin Serve loan. As will become apparent, the worth of Island Foliage's check was irrelevant to the operation of the financing transaction.

> ticular, Clariden bears no liability nor guarantee whatsoever for the payment of the monies due by the debtor [Fin Serve], be it as loan repayments, interest or for any other cause whatsoever connected with the loan.
>
> * * * * *
>
> *Article 6*
>
> The [P]rincipal agrees and undertakes to hold Clariden harmless for any loss, costs, taxes, expenses or damages whatsoever which Clariden might incur as fiduciary lender pursuant hereto, Clariden bearing no other liability or responsibility than that deriving from a gross negligence.[5]

Clariden and Fin Serve entered into a separate loan agreement; the principal amount of the Clariden-Fin Serve loan equalled the amount of the Island Foliage — Clariden fiduciary loan.

Appellees put the plan into practice on two occasions described in the indictment; here we discuss the plan as realized on December 17, 1979. Clariden, the partnerships, Fin Serve, and Island Foliage all had accounts at the First National Bank in West Palm Beach, Florida. On December 17, the following

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[5]The fiduciary-loan agreement provides that it is to be construed according to Swiss law. Swiss law, however, does not alter the conclusion drawn from Articles 3 and 6 of the fiduciary-loan agreement that Island Foliage, not Clariden, bears the risk of Fin Serve's non-performance. Indeed, one of appellees' Swiss experts opined as follows in response to the government attorney's question:

> Q: Now, under the terms of the fiduciary loan agreement, Clariden Bank has an obligation to repay principal to Island Foliage if and only if it receives principal repayment from Fin Serve?
>
> A: Yes.

transaction occurred: Island Foliage deposited a check for $27,550,000 into Clariden's account (performing its duty under the fiduciary-loan agreement); Clariden deposited a check for a like amount into Fin Serve's account (fulfilling its duties under both the fiduciary-loan agreement and the Clariden-Fin Serve loan agreement); Fin Serve deposited checks for an aggregate amount of $27,550,000 into the accounts of the several partnerships (consummating the loans to the partnerships); and then, in partial payment for the shrub commitments, the partnerships wrote checks totalling $27,550,000 to Island Foliage.

Heller and Adler thus orchestrated a simple circling of funds from Island Foliage to Clariden to Fin Serve to the partnerships and then back to the coffers of Island Foliage.[6] Prospective investors were led to believe that the loans to the partnerships, used to purchase commitments of shrubbery from Island Foliage, would be treated as cash payments generating deductible business expenses for the limited partners. The government charged that the loan transaction was a sham, incapable of facilitating any tax deduction.

Count one of the indictment alleged in part as follows:

OBJECTS OF THE SCHEME

10. The objects of the scheme to defraud of EDWARD H. HELLER and ROBERT M. ADLER were:

> a. to defraud citizens throughout the United States by causing them to invest money in tax shelters formed as limited partnerships by falsely, fraudulently and unlawfully representing that the limited part-

[6]Of course, this circling of checks would have yielded no funds for Island Foliage to use in purchasing shrubbery from growers. The indictment alleges that Heller caused Island Foliage to create fictitious contracts with growers representing that shrubs had been purchased.

ners would be able to claim income tax deductions larger than the amount of cash they invested in the partnerships.

b. to defraud the Internal Revenue Service, an agency of the United States, by impairing, obstructing and defeating its lawful audit and revenue collection function.

Paragraph ten of count one was realleged in each of counts two through eight.

The indictment proceeded to describe the mechanics of appellees' plan. Following is an excerpt from count one of the indictment detailing the plan as executed on December 17, 1979:

27. It was part of the scheme and artifice to defraud that on or about December 17, 1979, EDWARD H. HELLER and ROBERT M. ADLER caused Island Foliage through its agent Clariden Bank of Zurich, Switzerland, falsely and fraudulently *to lend fictitious funds* totalling $27,550,000 to Fin Serve, B.V.

28. It was part of the scheme and artifice to defraud that on or about December 17, 1979, EDWARD H. HELLER and ROBERT M. ADLER caused Fin Serve, Inc.[7] falsely and fraudulently *to lend fictitious funds* totalling $27,550.000 to nineteen limited partnerships to finance claimed product purchases from Island Foliage.

29. It was part of the scheme and artifice to defraud that on or about December 17, 1979, EDWARD H. HELLER and ROBERT M. ADLER

[7]Fin Serve, Inc. was a wholly-owned subsidiary of Fin Serve, B.V.

caused Island Foliage falsely and fraudulently to draw a check for $27,550,000 to Clariden Bank.

30. It was part of the scheme and artifice to defraud that on or about December 17, 1979, EDWARD H. HELLER and ROBERT M. ADLER caused Clariden Bank falsely and fraudulently to draw a check for $27,550,000 to Fin Serv[e], B.V.

31. It was part of the scheme and artifice to defraud that on or about December 17, 1979, EDWARD H. HELLER and ROBERT M. ADLER caused Fin Serve, Inc. falsely and fraudulently to draw nineteen checks totalling $27,550,000 to the order of nineteen limited partnerships.

32. It was part of the scheme and artifice to defraud that on or about December 17, 1979, EDWARD H. HELLER and ROBERT M. ADLER caused nineteen limited partnerships falsely and fraudulently to draw checks totalling $27,550,000 to Island Foliage.

(Emphasis supplied). The foregoing six paragraphs were realleged in each of counts two through eight.

II.

Upon a motion to dismiss the indictment, the district court took extensive evidence on the nature of Clariden's loan to Fin Serve. Over the government's relevancy objection, the court heard from several well-credentialed Swiss and American banking experts, and distilled from their testimony two conclusions of law. First, the court determined that as a matter of Swiss banking law, the loan from Clariden to Fin Serve was "real." The court was impressed by the fact that Fin Serve had, under Swiss law, a right to sue Clariden for

the $27,550,000 even if Island Foliage did not deposit a like amount into Clariden's account. Second, the court found that the funds circled among the parties on December 17, 1979, were not "fictitious," but "real." The court based this finding on testimony that banks transfer "real" money through debits and credits, and not in satchels of cash. Concluding, therefore, that paragraphs twenty-seven through thirty-two of count one could not as a matter of law be proven, the court dismissed all counts against Adler, and dismissed counts one through eight against Heller.[8] We review this disposition *de novo*. *Cf. United States v. Irvin*, 787 F.2d 1506, 1511-12 (11th Cir.1986).

The district court's findings are irrelevant to the legal sufficiency of the indictment. Heller and Adler were not charged with violating Swiss banking law, or with passing *Monopoly* money among themselves, but with visiting a fraud on limited partners and the Internal Revenue Service by representing that the Fin Serve loans could enable the limited partners to reap a certain tax benefit. Count one of the indictment sets forth plainly this theory of prosecution; the fraud signalled in paragraph ten colors the interpretation of the adjectives "false," "fraudulent," and "fictitious" employed elsewhere in counts one through eight. The indictment thus fairly informs appellees of the charges against which they must defend. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *United States v. Chilcote*, 724 F.2d 1498, 1504 (11th Cir.), *cert. denied*, 467 U.S. 1218, 104 S.Ct. 2665, 81 L.Ed.2d 370 (1984).[9]

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[8]Paragraphs 20-26 & 33 described parts of a similar scheme; these paragraphs were also repeated and realleged in counts 2-8, and were also struck by the district court.

[9]We therefore reject the district court's finding that late in the pre-trial maneuvering, "the government suddenly announced its new opinion that the loans were also fraudulent and fictitious because then could not produce the tax consequences described by Adler in his tax opinions." This

A.

We accept for argument's sake the district court's conclusion that Clariden's loan to Fin Serve was entirely regular as a matter of Swiss law, and that Clariden would have owed $27,550,000 to Fin Serve regardless of whether Island Foliage performed under the fiduciary-loan agreement. According to paragraph ten in count one of the indictment, Heller and Adler represented that the December 17 transaction would enable the limited partners to realize a certain tax result. Should the jury find that this representation was baseless, and find that appellees acted fraudulently, the jury could find that Heller and Adler defrauded the limited partners and the Internal Revenue Service.

To amplify, federal tax law disregards transactions lacking an economic purpose which are undertaken only to generate a tax savings. Federal tax law is concerned with the economic substance of the transaction under scrutiny and not the form by which it is masked. *Commissioner v. Court Holding Co.*, 324 US. 331, 334, 65 S.Ct. 707, 708, 89 L.Ed. 981 (1945); *Gregory v. Helvering*, 293 U.S. 465, 469, 55 S.Ct. 266, 267, 79 L.Ed. 596 (1935); *see generally Kirchman v. Commissioner*, 862 F.2d 1486, 1490-94 (11th Cir.1989). If Clariden's participation in the transaction was economically unnecessary, the sundry rights and duties created by Swiss law are without consequence to any federal tax considerations and are therefore irrelevant to the fraud charged in the indictment. The government could argue to the jury, for example, that stripped of the smoke and mirrors, the December 17 transaction yielded nothing but a simple promise on behalf of the partnerships to

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"new opinion" is fairly stated in the indictment. This district court's acknowledged hunch that this theory must not have been presented to the grand jury is baseless.

pay Island Foliage for future deliveries of shrubbery.[10] Thus, the jury could find that by simultaneously recording a debit and a credit for an identical sum of money, Clariden functioned as a conduit between Island Foliage and Fin Serve; Fin Serve could similarly be viewed as a conduit between Island Foliage and the partnerships. The result of the transaction would be a loan from Island Foliage to the partnerships. Of course Island Foliage had no cash to lend (its check to Clariden having been worthless) — but no matter: as the loan was immediately used by the partnerships to purchase future commitments of shrubbery from Island Foliage, the transaction was no different in substance from a promise to pay for those future commitments. No cash payment would have been made in any event.[11]

The partnerships' executory promises to pay Island Foliage for future deliveries of shrubbery would not have generated deductions for the limited partners; the partnerships actually had to pay cash for the shrubs.[12] As we cannot say that a jury

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[10]We do not suggest that the government cannot proceed before the jury with a different characterization of the Clariden transaction; the government need only prove that the transaction was a sham.

[11]Further, as the partnerships simply returned the funds that Island Foliage had previously deposited with Clariden, Island Foliage would have no new funds with which to purchase shrubbery from the growers. This is but one more aspect of the fraud charged in the indictment. *See supra* note 6.

[12]Adler explained as follows in a private-placement memorandum dated January 12, 1978:

> The Nursery and Tree Divisions have adopted the cash method of accounting. Under the cash method, the payments made during the Partnership's current fiscal year for seedlings and bulbs and farming services may be claimed as a deduction in that year. Treas. Reg. 1.162-12(a).

Treas.Reg. § 1.162-12(a) (1972) provides in pertinent part:

> A farmer who operates a farm for profit is entitled to deduct

would not be justified in finding that the transactions actually created nothing but an executory contract between Island Foliage and the partnerships, the jury could also conclude that Island Foliage's performance under the fiduciary-loan agreement made Clariden's participation in the December 17 transactions economically unnecessary — a sham.[13]

B.

We will not quarrel with the conclusion that "real" money passed between the parties as a consequence of First National's sequential debits and credits to the accounts of Island Foliage, Clariden, Fin Serve, and the partnerships. Heller and Adler, however, were charged with "falsely, fraudulently and unlawfully representing that the limited partners would be able to claim income tax deductions larger than the amount of cash they invested in the partnerships," and, to that end, causing Clariden and Fin Serve "to lend fictitious funds." If for the purposes of the relevant federal tax law Fin Serve and the partnerships left the table having borrowed no money at all, but Heller and Adler fraudulently had represented the con-

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from gross income as necessary expenses all amounts actually expended in the carrying on of the business of farming.

[13]If Clariden's primary responsibility in appellees' plan was to book offsetting debits and credits in its First National account, and appellees did not intend Clariden to risk its own funds (which is certainly a reasonable inference, *see supra* note 5), this is answer enough to appellees' attempts to distinguish the Ninth Circuit cases *United States v. Crooks*, 804 F.2d 1441 (9th Cir.1986) and *United States v. Clardy*, 612 F.2d 1139 (9th Cir.1980). For example, Heller states that "[i]n *Crooks*, ... the parties merely circulated worthless checks among themselves to generate deductions. No party, including the lender, had sufficient funds to cover its checks. The court naturally found this a sham and fraudulent." The government may argue to the jury that appellees did not intend or have a right to expect that Clariden's allegedly substantial funds could be used to cover the checks.

trary, a jury could find that Clariden and Fin Serve *loaned* "fictitious funds" in spite of their choreographed transfers of "real" money.

III.

For an alternative basis to dismiss portions of the indictment, the district court held as a matter of law that neither Heller nor Adler could have formed the requisite criminal intent: the absence of a prior Internal Revenue Service statement or court opinion condemning schemes precisely like appellees', as well as the conflicting opinions of the experts who testified at the hearing, demonstrated "legal uncertainty" as to the tax consequences of the scheme.

Legal uncertainty in tax prosecutions can derive from arguably conflicting government pronouncements on narrow issues of law. *See United States v. Garber,* 607 F.2d 92 (5th Cir.1979) (in banc) (taxability of income derived from sale of blood antibodies uncertain because of prior permissive opinions of Supreme Court and Attorney General); *and United States v. Critzer,* 498 F.2d 1160 (4th Cir.1974) (taxability of income derived from land held by United States in trust for Native American reservation uncertain because of conflicting statements by administrative agencies). In these cases, conflicting government intepretations yielded impermissibly vague legal rules. Because the government attempted to prosecute its citizens under vague laws, the defendant's subjective intent to engage in prohibited conduct was irrelevant. *Garber,* 607 F.2d at 98; *Critzer,* 498 F.2d at 1162; *United States v. McClain,* 593 F.2d 658, 670 (5th Cir.), *cert. denied,* 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979). *See United States v. Burton,* 737 F.2d 439, 444 (5th Cir.1984) (in *Garber,* "[a]wareness of legal debate . . . was virtually presumed; however, we did not hold that in the absence of such a level

of uncertainty — approaching legal vagueness — that we could not require a defendant to link his own belief to the evidence of legal uncertainty").

The rule against sham transactions for tax avoidance is quite well-settled, however, and appellees do not assert that it is vague; rather, appellees claim uncertainty of whether their transaction falls factually within its prohibition. Appellees' subjective intent to engage in prohibited conduct (assuming the transaction was a sham) is thus relevant to the prosecution. The government must prove that appellees evidenced an intent to engage in a transaction within the prohibition. *United States v. Heller*, 830 F.2d 150, 155 (11th Cir.1987)[14] (uncertainty created by prior Tax Court decision approving certain accounting method; if defendant "followed such a method, or believed in good faith he was following the method, criminal liability cannot be imposed upon him").

One way for appellees to demonstrate lack of intent would be to point to a Tax Court decision, an IRS opinion, or some other authoritative statement that arguably condones activities similar to theirs for ends similar to theirs. If appellees produce such a statement, the district court may in its discretion admit it into evidence, and should then instruct the jury as this court recently suggested in *Heller:* if appellees patterned their transaction after the statement, or in good faith intended to pattern their transaction after the statement, they cannot be punished criminally. *Id.*, 830 F.2d at 155.

Appellees may not, however, rely merely upon the *absence* of an official statement *prohibiting* behavior identical to the theirs,[15] coupled with opinions of partisan experts who opine

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[14]Appellee Heller is not related to the defendant in *United States v. Heller*, 830 F.2d 150 (11th Cir.1987).

[15]*United States v. Brown*, 555 F.2d 336, 339-40 (2d Cir. 1977) (criminal statute not inapplicable to defendant merely because "there is no litigated

after the deal is done, to establish legal uncertainty. These factors will be present in any prosecution for concocting bogus tax shelters. If on the basis of a more substantial proffer the district court admits evidence of legal uncertainty, however, expert testimony may be probative of the sincerity and reasonableness of appellees' beliefs.

IV.

The district court's order dismissing portions of the indictment against Heller and all of the indictment against Adler is VACATED, the indictment is REINSTATED in full, and the prosecution should proceed.

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fact pattern precisely in point''). We recognize that *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir.1983), *cert. denied*, 466 U.S. 980, 104 S.Ct. 2363, 80 L.Ed.2d 835 (1984), may be to the contrary. *Dahlstrom* held that the government failed to establish criminal intent because it could not cite a case disapproving of a tax shelter similar to the defendants' activities; also, a government witness testified that foreign trusts used in the tax shelter were ''valid legal entities.'' 713 F.2d at 1427. We disagree that these two factors, without more, constitute a defense to a fraudulent tax-shelter prosecution. Clever swindlers could rarely be prosecuted if a particular sham must be ruled illegal before its use can be criminal; and, as with the instant case, the regularity of a transaction under local law is often irrelevant to the question of federal tax consequences.

We note that the Ninth Circuit recently distinguished *Dahlstrom* and considerably diminished its reach: in *Dahlstrom*, the defendants not only advocated a tax shelter, but ''occasionally assisted [a taxpayer] in establishing his [tax shelter] by travelling to the designated country and executing the requisite trust documents on behalf of [the taxpayer].'' 713 F.2d at 1425. The court in *United States v. Schulman*, 817 F.2d 1355, 1359 (9th Cir.), *cert. dismissed*, ____ U.S. ____, 108 S.Ct. 362, 97 L.Ed.2d 803 (1987), read *Dahlstrom* as follows: ''*Dahlstrom* is more properly read as a case barring the '[p]rosecution for *advocacy* of a tax shelter program in the absence of any evidence of a specific intent to violate the law . . .' [citing cases]. In this case, Schulman did not merely advocate the tax shelter in question, he was involved in 'orchestrating the generation of the questionable tax deduction.' [citing cases].'' (Emphasis in original.)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5105

D.C. Docket No. 84-6106

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

EDWARD H. HELLER and
ROBERT M. ADLER,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before FAY and KRAVITCH, Circuit Judges, and LYNNE*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the District Court's

*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

order dismissing portions of the indictment against defendant Heller and all of the indictment against defendant Adler is VACATED; the indictment is REINSTATED in full, and the prosecution should proceed in accordance with the opinion of this Court.

Entered: March 2, 1989
For the Court: Miguel J. Cortez, Clerk

By: /s/ Kareen McNabb
Deputy Clerk

ISSUED AS MANDATE: APR 20 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5105

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

EDWARD H. HELLER and
ROBERT M. ADLER,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion March 2, 1989, 11 Cir., 1989, ____ F.2d____).
(April 10, 1989)

Before FAY and KRAVITCH, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

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*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-6106-Cr-HASTINGS

UNITED STATES OF AMERICA, Plaintiff vs. EDWARD H. HELLER and ROBERT ADLER, Defendants.	**ORDER**

THIS CAUSE comes before the Court upon Defendant ROBERT ADLER's Appeal of the Magistrate's Denial of his Motion to Dismiss Indictment. The Motion has been adopted by Defendant EDWARD HELLER. The parties have favored the Court with voluminous memoranda and exhibits. An evidentiary hearing was held on December 18, and 19, 1986. After hearing testimony, and receiving evidence and oral argument, the Court announced dismissal of the indictment against ROBERT ADLER as well as those portions of the indictment against EDWARD HELLER stemming from the issues raised by Defendant ADLER and upon which the Order of Dismissal is based. This written opinion now follows.

The indictment in this case contains eleven counts. Defendant ADLER is named in the first five counts only. Count I

charges Defendants HELLER and ADLER with a scheme to defraud investors by mail in violation of 18 U.S.C. §1341. Counts 2-5 charge Defendants HELLER and ADLER with placing in the mail a form entitled "Partner's Share of Income, Credits, Deductions" addressed to various limited partners in the investment scheme. These mailings were also allegedly in violation of the mail fraud statute.

Counts 6-9 charge Defendant HELLER with transporting checks taken by fraud. Counts 10 and 11 charge Defendant HELLER with filing false income tax returns.

NATURE OF THE PARTNERSHIPS

The limited partnerships were offered to investors by HELLER through various entities which he controlled. The partnerships were to engage in the purchase of horticultural products, such as ornamental trees, shrubs and foliage plants for resale in the future. The partnerships were attractive as tax shelters because each limited partner was supposed to recognize a loss equivalent to twice the amount of his investment in the partnerships. This result was possible because each partnership was to purchase horticultural products with capital paid by the investors and for each dollar invested each partnership would borrow an additional dollar with which to purchase products. Because the partnerships were not expected to resell any product for profit in the initial years of operation, the partners would realize the 2 for 1 loss.

These partnership activities were conducted in 1976-1979. Mr. Adler's connection with the partnerships stems from his authorship of various tax opinions describing the tax benefits discussed above. His opinions were published in various circulars offered to investors. The indictment charges and the Government's position has been that the opinions were part

of the scheme to defraud because the funds borrowed by the partnerships to achieve the tax benefits were not real funds but were "fraudulent and fictitious."

TROUBLESOME FINANCING: The Swiss Connection

During the years 1976-77 financing was obtained from the Dania Bank, Dania, Florida. The Government has not attacked the validity of this financing.

In 1978 and 1979 the financing was obtained from Clariden Bank, Zurich, Switzerland. Both the Dania financing and the Clariden financing were circular in nature. That is, the funds lent by the bank eventually were re-deposited at the bank as security for loans.

According to Defendant's argument, the partnerships were to borrow money from an entity called Fin Serve and pledge investors' promissory obligations and partnership inventory as collateral. Fin Serve was in turn to borrow money from Clariden, collateralizing the loan with investor notes and partnership property pledged to it by the partnerships.

The partnerships were to buy all their horticultural products from Island Foliage, Inc. With the excess cash it received from the purchase of products Island Foliage would make a cash deposit into a blocked account at Clariden to be used as collateral for Clariden's loan to Fin Serve.

The parties are not in dispute as to how the mechanics of these transactions were accomplished. The procedure was basically the same for the years 1978 and 1979. In 1979 the Swiss bankers and representatives of the various entities met at the First National Bank in West Palm Beach, Florida:

(1) Island Foliage wrote a check to Clariden for $27.5 million. All parties agree that at the moment the check was

written Island Foliage did not have funds to cover the check.

(2) Clariden then wrote its check to Fin Serve for $27.5 million.

(3) Fin Serve wrote a check to the growers in like amount.

(4) The growers wrote a check to Island Foliage.

The loan agreements between Clariden, Island Foliage and Fin Serve are governed by two documents — the Fiduciary Loan Agreement between Clariden and Island Foliage and the Loan Agreement between Clariden and Fin Serve. It has been the Government's stated position throughout this litigation (up until the December 18th, 1986 hearing) that the sole basis of the indictment against Adler was that Island Foliage was the real lender in the circle of financing. Since Island Foliage had no money to lend, the financing was fraudulent and fictitious. (See Exhibit 1 to Defendant Adler's Summary of Argument, filed Dec. 16, 1986 for the multitudinous reiterations of this position by the Government).

Indeed the Fiduciary Loan Agreement describes a transaction wherein Clariden is loaning money to Fin Serve in its own name but for the account of Island Foliage. This document could understandably lead to the conclusion that Island Foliage was the true lender. However, the Loan Agreement between Clariden Bank and Fin Serve describes a loan of money from the bank to Fin Serve in which the bank appears to be the real lender. Both these documents are to be construed under Swiss law.

MONEY OR CONFETTI: A Matter of Law

The Government argued at the Dec. 18th hearing that at the closing of the loan transactions no "real money" was passed around the circle. The Government rather colorfully

characterized the passing of checks as the transfer of "bags of confetti". The Government urged that the loan documents be presented to the jury for its determination as to whether "real money" was in fact loaned.

This view is not supported by legal authority. Federal Rule of Criminal Procedure 26.1 states in relevant part:

> The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

This rule, as interpreted by decisional precedent binding on our circuit, means that it is for the judge rather than the jury to determine questions of foreign law. *U.S. v. McClain*, 593 F.2d 658, 669-70 (5th Cir. 1979), *cert. denied*, 444 U.S. 918.[1]

The interpretation of the rights and obligations of the parties under the Swiss loan documents and whether, under Swiss banking law, a real loan was made by Clariden, are issues of foreign law for the Court to determine. In order to decide these issues, the Court took testimony from expert witnesses presented by the parties and received numerous exhibits and written expert opinions as well as the depositions of the Swiss bankers involved.

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[1]In *U.S. v. McClain*, the fact that the issue of foreign law was submitted to the jury was held not to be reversible error because of an absence of prejudice and near overwhelming evidence of intent to violate foreign and domestic law. *Id.* at 670.

Since the issue is here presented on a Motion to Dismiss (rather than first raised on appeal as in *McClain*), this Court can apply Rule 26.1 correctly and avoid committing the error made by the *McClain* Court.

THE EXPERTS AGREE: The Loans Were Real

Defendant Adler presented as his first witness Dr. Peter Noble, an eminent Swiss expert on Swiss banking law. Dr. Noble is a Swiss attorney, Professor of banking law, and Deputy Judge of the Court of Appeals of the Canton of Zurich. He has written, among other things, a widely used text on Swiss banking law.

The Court was impressed with his knowledge of Swiss banking law, his understanding of the issues, and his familiarity with the documents and transactions in this particular case. Dr. Noble claims no expertise in American tax law and was qualified only as an expert in Swiss banking law.

Dr. Noble testified that he reviewed the Fiduciary Loan Agreement and the Loan Agreement. According to his interpretation of the documents, Island Foliage was required to make a deposit with Clariden. Clariden was required to make a loan to Fin Serve. Fin Serve was required to make a loan to the partnerships to use the funds to buy plants from Island Foliage and Island Foliage was to deposit money in a blocked account with Clariden. Under Swiss law, Clariden was not required to have the deposit from Island Foliage before giving the loan to Fin Serve.

The rights and obligations of the parties are such that under Swiss law, according to Dr. Noble, Clariden was not the agent of Island Foliage. Rather, Fin Serve had an independent right to sue Clariden and enforce the Loan Agreement.

To determine whether a loan was actually consummated under the documents, Dr. Noble then reviewed the Clariden Bank records. These showed that Clariden credited Fin Serve with the $27.5 million and then Fin Serve made use of that credit. That is, it withdrew those funds. Deposits were made

into Clariden Bank with checks from Island Foliage. Disbursements were made with Clariden's own checks.

It is Dr. Noble's expert opinion that Clariden loaned its *own* money to Fin Serve. That conclusion is also adhered to by Dr. Dieter Neupert, whose qualifications as an expert are not disputed.[2]

Dr. Noble testified on cross-examination that Clariden had a right to a commission on the transaction but not to retain any interest; that the bank did not withhold Swiss taxes on the transaction; that the transaction was listed on Clariden's book-keeping records but not on its balance sheet and that the transaction was not subject to the Swiss reserve requirement.

Dr. Noble testified that these matters were entirely in keeping with Swiss legal requirements, even reading at times from the specific sections of the Swiss Banking Code. He found these aspects of the transaction in no way affect the conclusion that Clariden made a loan of its own funds.

The testimony of Dr. Noble, a most credible and impressive witness, carried the day on the issue of whether real funds were loaned, as there were no competent witnesses to rebut this conclusion.

Defendant Adler next presented two eminent American banking law experts, Mr. Schwartz and Mr. Scott. These gentlemen did not claim expertise in Swiss banking law and relied on the Swiss experts for interpretation of the banking documents. They were able to offer expert testimony as to the propriety of the mechanics of the closing.

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[2]In making a determination of foreign law under Rule 26.1, the Court may consider any relevant material whether or not admissible under the Federal Rules of Evidence.

They both debunked the Government's "confetti" theory. After reviewing the bank records, Mr. Schwartz determined that real money was loaned. First National City credited Clariden's account as a result of Island Foliage's checks to Clariden. He testified that under banking law and practice money is moved around by debits and credits to accounts and not by moving bags of greenbacks around the table.

Mr. Scott, a Professor of Law at Harvard, testified that the transaction was arranged in an efficient manner. With regard to Island Foliage's absence of funds at the time it wrote its check to Clariden, he testified that it didn't make sense for Island Foliage to actually come with cash and then take it home again. The Court views the testimony of Messrs. Schwartz and Scott as merely cumulative to the testimony of Dr. Noble.

The Government offered in rebuttal the depositions of the Swiss bankers who participated in the transactions and the testimony of American tax expert Mr. O'Shea.

The depositions offered are not signed by the witnesses and under Swiss law are not valid until signed. The depositions were also taken under conditions which might preclude their admissibility at trial; however, the Court will consider them for the limited purpose of the 26.1 determination.

The depositions present the bankers' view of the mechanics and consequences of the loan transactions. However, the Court found nothing in the depositions which would affect the legal conclusions that Clariden made a loan of its own money since the bankers are not experts in Swiss banking law. The testimony of banker Sonderegger confirms that Clariden credited the loan account of Fin Serve, and that the account was then debited. This means that the funds were used. "That they went out." (Vol. 4; p.356-57).

Should either of the deponents, after reading the transcripts,

determine that there are errors, the Court will strike them. This would in no way affect the Court's reasoning or conclusions on the issues presented.

The Government's expert witness Mr. O'Shea has worked as an IRS attorney since 1978 and is now Branch Chief of the partnership branch. While Mr. O'Shea is clearly an expert in American tax law he admittedly possesses no expertise in Swiss banking law. He did not consult any Swiss experts other than reading the reports and hearing the testimony of Defendant's experts. Nevertheless, Mr. O'Shea interpreted the Swiss loan documents and concluded that no real money was loaned. Mr. O'Shea is not competent to give expert testimony as to whether Clariden Bank made a loan of its own money under the Swiss law which governs the transaction. His personal non-expert opinion on this point must be discounted.

For the above reasons, the Court concludes, as a matter of foreign law, that a real loan was made from Clariden Bank to Fin Serve and therefore the borrowed funds were not fraudulent and fictitious as charged in the indictment.

TAX CONSEQUENCES OF THE LOAN

The Government has, on numerous previous occasions characterized Defendant Adler's crime as follows:

> Defendant Adler's participation in the scheme is not based on the accuracy of his analysis of the disclosed tax risks but on his concealment of the material fact that in 1978 and 1979, Island Foliage was the source of the loan funds and it had no funds to lend.
>
> (Government's Memorandum in Opposition to Defendant's Several Pending Motions, filed March 29, 1985 at 36).

On that theory, Dr. Noble's testimony and this Court's ruling that Clariden made a real loan, would require dismissal of the indictment against Defendant Adler. Notwithstanding its representations to the Court as to the meaning of the charges, at the December 18, 1986 hearing, the Government suddenly announced its new opinion that the loans were also fraudulent and fictitious because they could not produce the tax consequences described by Adler in his tax opinions. This argument must fail for two reasons:

(1) the tax consequences of the loan were not settled law at the time the opinions were written;

(2) no evidence was presented to the grand jury on this theory of guilt.

(1) BATTLE OF THE EXPERT WITNESSES

The question of the tax consequences of the loan is likewise for the Court rather than the jury. *U.S. v. Garber*, 607 F.2d 92 (5th Cir. 1979); *U.S. v. Burton*, 737 F.2d 439 (5th Cir. 1984). On this issue, Defendant presented two eminent American tax experts, Mr. Klayman and Sheldon S. Cohen, former Commissioner of the I.R.S. (1965-69).

Mr. Klayman testified that he relied on Swiss counsel to define the relationship of the parties and in this instance, based on Swiss counsel's analysis, Mr. Klayman was satisfied that Clariden Bank was a lender. Mr. Klayman made a distinction with which this Court agrees completely and which the Government disputes. Mr. Klayman (as well as Mr. Cohen) believes that where there is a real loan under banking law, the I.R.S. may, under its own regulations, refuse to recognize the loan for favorable tax treatment. This non-recognition by the I.R.S. *does not* mean the loan itself was fraudulent and fictitious.

Mr. Klayman testified, and the Government agrees that in 1978 and 1979, when Mr. Adler wrote his tax opinion, the standard by which a tax lawyer's opinion was judged was the "reasonable basis" standard. That is, the position he propounded in that tax opinon had to be at least arguable. (In 1982 a more stringent standard was adopted). Mr.Klayman opined that Defendant Adler, in 1979, had a reasonable basis for his tax opinion. Mr. Klayman believes that there was no substantial difference in substance between the Dania and Clariden financing. Defendant Adler also submitted numerous opinions of other tax lawyers regarding the tax consequences of the Dania loans (Defendant's Exhibit 8) to support the reasonable basis of Adler's tax opinion.

Mr. Klayman further testified that it was "foolish" for an American lawyer to come to his own conclusion on the status of Clariden as a lender, since that was a matter of Swiss law and Swiss expert counsel should be relied on to make that determination.

Mr. Cohen was in complete agreement with Mr. Klayman's testimony and believes that the loan in 1979 would have been considered valid for tax purposes.

The Government's tax expert, Mr. O'Shea simply disagrees with Messrs. Klayman and Cohen's conclusions. Contrary to the proper procedure described by those gentlemen, Mr. O'Shea relied on his own reading of the Swiss documents to come to the conclusion that no real money was loaned. As discussed previously, Mr. O'Shea did not possess the expertise to make this determination. In his expert capacity, Mr. O'Shea testified that he did not believe the I.R.S. would recognize the Dania financing even though real money was borrowed. While the Court respects Mr. O'Shea's opinion as to the loan's disqualification, what we have here is, at best, a disagreement among experts as to what treatment the loan

should have received. On this issue the law is clear: the indictment must be dismissed.

The substance of a taxpayer's interests and rights upon which federal taxation turns is a question of local law. *Morgan v. Commissioner*, 309 U.S. 78, modified, 309 U.S. 626 (1940). This rule applies when the interests have been created by foreign law as well as the law of a U.S. state. *MCA, Inc v. U.S.*, 685 F.2d 1099, 1101 (9th Cir. 1982). It is therefore inescapable that the interests, rights and obligations created by the Loan Agreement and the Fiduciary Loan Agreement between Clariden Bank, Island Foliage and Fin Serve must be defined under Swiss law. Having determined under local law, that Clariden Bank did loan funds to Fin Serve, it becomes a matter for the I.R.S. to determine how the loan should be treated for tax purposes.

In the matter of the partnerships involved in this case, there are no I.R.S. opinions or case law which held that the circular loans at issue are not valid for tax purposes. Where there is no clear evidence of the illegality of the tax shelter, the Government cannot prove the element of willfulness. *U.S. v. Schulman*, Case no. Cr 86-253 MPD (C.D. Ca. 1986); where the law is uncertain as to whether a deduction is legal, the indictment must be dismissed. *U.S. v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983); *cert. denied*, 104 S.Ct. 2363; *U.S. v. Ingredient Technology*, 698 F.2d 88 (2d Cir. 1983), *cert. denied*, 103 S.Ct. 3111.

In this instance uncertainty existed as to the tax consequences of the loan as evidenced by the opinions of Messrs. Klayman, Cohen and the attorneys' opinions in Defendant's Exhibit 8 vs. the opinion of Mr. O'Shea. In this nation, a man simply cannot be indicted for a difference of opinion. "Due process requires that a person be given fair notice as to what constitutes illegal conduct so that he may conform his con-

duct to the requirement of the law." *Dahlstrom, supra* 713 F.2d at 1427.

Based on the expert testimony of Messrs. Klayman and Cohen the Court finds, as a matter of law, that Mr. Adler had a reasonable basis for his tax opinions and that no clear evidence of the non-qualification of the loans existed. Accordingly, the indictment must be dismissed against him.

(2) The Grand Jury Evidence

This Court has not reviewed the Grand Jury transcript in this cause. However, based on the years of litigation in this case, wherein the Government has continuously asserted its "no real money" theory, the Court must presume that only evidence on this theory was presented to the Grand Jury. The Government has never argued otherwise. The Government must be able to proceed on the theory which it presented to the Grand Jury. If it cannot proceed on that theory, the indictment should be dismissed. *U.S. v. Frankel,* 721 F.2d 917 (3d Cir. 1983). The Government cannot now proceed on the new theory without re-indictment.

For all the reasons set forth above, the indictment will be dismissed against Defendant Adler. The Court has reviewed the indictment and concluded that paragraphs 20-33 of Count I facially derive from the "fraudulent and fictitious" loan theory and must be stricken from the indictment. With regard to the remainder of the indictment against Defendant Heller, Government counsel, as officers of the Court, shall determine which counts were indicted upon evidence other than the "false and fictitious" loan theory. The Government may proceed on those portions of the indictment. The Government shall inform the Court and defense counsel, no later than February 6, 1987, how it intends to proceed against Defendant Heller.

It is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss the Indictment is GRANTED and the indictment is DISMISSED in its entirety against Defendant ROBERT ADLER. It is further

ORDERED AND ADJUDGED that the indictment is DISMISSED IN PART against Defendant EDWARD HELLER as described above.

DONE AND ORDERED this 20 day of January, 1987.

/s/ Alcee L. Hastings
ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

APPENDIX

PRIVATE PLACEMENT MEMORANDUM

CONFIDENTIAL
May 18, 1979

BUFFALO GREENHOUSE, LTD.
(a Florida Limited Partnership)

* * * * *

Tax Risk Factors

* * * * *

(e) The IRS may claim that the Partnership cannot claim deductions represented by the amounts borrowed by it for use in the purchase of horticultural items. If this position were sustained, this would result in a deferral of some of the claimed deductions until such time as the horticultural items were sold, and would reduce or possibly eliminate the taxable income of the Partnership in one or more subsequent years. (See "FEDERAL TAX CONSIDERATIONS.")

(f) The IRS may contend that the borrowings by the Partnership for which the investor is personally liable do not meet the "at risk" requirements of Section 465(b)(1)B of the Code, as amended. If any such contention were to be sustained, investors' deductions during the current fiscal year would not exceed the amount of invested cash. (See "FEDERAL TAX CONSIDERATIONS.")

* * * * *

(j) The Tax Reform Act of 1976 made significant changes in tax provisions affecting the transactions proposed herein. Since this legislation was only recently passed, there have not been any substantial judicial or administrative interpretations

of the various provisions. (See "FEDERAL TAX CONSIDERATIONS.")

* * * * *

Deductible Expenses by the Nursery and Tree Divisions Under the Cash Method of Accounting

The Nursery and Tree Divisions have adopted the cash method of accounting. Under the cash method, the payments made during the Partnership's current fiscal year for seedlings and bulbs and farming services may be claimed as a deduction in that year. Treas. Reg. 1.162-12(a). To be deductible during the current year, payment for services must be attributable to services actually rendered this year.

The provisions of Section 464 of the Code, are applicable to the deductions which will be claimed by the Nursery Division. This section requires in the case of "farming syndicates" that deductions for amounts paid for seed, fertilizer or other supplies may be taken only in the taxable year in which they are actually "used or consumed". While this section applies to the raising and cultivation of agricultural products, it does not apply to the raising of trees (other than trees bearing fruit or nuts), and hence should not control the deductions claimed by the Tree Division. Section 464(e)(1). These provisions are effective for taxable years beginning after December 31, 1975.

Management represents that the seed, fertilizer and other farm supplies purchased by the Nursery Division will be used during the taxable year of purchase. Accordingly, Section 464 should permit the deductibility of these expenses by the Limited Partners during the taxable year in which the purchases are made. In the event that nursery items are not "used or consumed" during the year of purchase, deductibility would be deferred until "use or consumption" occurred; and

would offset any corresponding amount of gross income generated by sales during that year.

Special Tax Counsel has received an opinion from an experienced horticulturalist that the species which the Tree Division intends to purchase are classified, on a botanical basis, as "trees." The General Partner has represented that the Tree Division will only purchase the trees so classified by this horticulturalist. Relying on this opinion, the purchases by the Tree Division should fall within the "tree" provisions of Section 464(e)(1).

We do note, however, that the IRS may claim that some or all of the trees purchased by the Tree Division do not fall within the intent of Congress in its statutory reference to "trees". In making this argument, the IRS may rely on language in the legislative history which mentions "forestry" or the growing of "timber" in discussing the "tree" provisions. Thus, the Statement of the Managers for the Conference Committee, filed on September 13, 1976, in discussing that growing or raising of trees is not considered "farming," states (P. 415): "Thus, this provision does not apply to forestry or the growing of timber."[2]

If this argument was, in fact, raised by the IRS, the Partnership has substantial counterarguments. Initially, the word 'trees" is used in the statute, and not "forestry" or "timber". That Congress intended by using the word "trees" to convey a broader category of included species other than "forestry" or "timber" is indicated by other sections of the Code dealing with timber, wherein the word "timber" itself

[2]Similar statements appear in other portions of the legislative history. See, Summary of the Tax Reform Act of 1976, prepared by the Joint Committee on Taxation, Section 207(a)(b), Page 7; and, Conference Committee Report on H.R. 10612, Section 204(a)(b), Page 415, and Section 204(c), Page 416.

is used. See, Sections 611(a), 631(a), and 1231(b)(2). Further, other language in the legislative history of the TRA of 1976 is supportive of the argument that "trees" is broader than merely "timber" or "forestry." Specifically the Summary of the Conference Agreement, prepared by the House Committee on Ways and Means, states (P. 5) in discussing the farming syndicate rules:

> "For purposes of the farming syndicate rules, activities involving the growing or raising of trees are not considered farming unless the activities involved fruit or nut trees. Thus, this provision does not apply to forestry or to growing of timber "*or to nursery operations involving the growing of trees.*" (Emphasis supplied.)

Most recently, the General Explanation of the Revenue Act of 1978, prepared by the Staff of Joint Committee on Taxation, made a similar reference in its discussion of Section 353 of that Act at page 204:

> The Act excepted nurseries from the required accrual accounting and capitalization of proproductive period expense rules. The basic reason for this exception was that it takes several years from the time of planting for the *trees raised by nurseries* to reach a marketable condition. (emphasis added)

If the items purchased by the Tree Division are not considered "trees" under Section 464, then the investor should still be entitled to deductions for purchases made by the Nursery Division which should represent the amount of actual cash investment. Further, in the event that the Tree Division items are not considered to be "trees", this should, at most, only cause a deferral of the related deductions. The Tree Division purchases would be subject to the "used or consumed" requirement of Section 464. Once this test was met,

deductibility should be allowed (assuming that investor is "at risk" for the amount of deductions claimed.)

Section 465 of the Code, as amended, provides that the amount of any loss (otherwise allowable for the year) which may be deducted in connection with "farming activities" cannot exceed the amount with respect to which the Limited Partner is "at risk" at the close of the taxable year.

The amount "at risk" is the amount of money (and the adjusted basis of other property) contributed to the activity. Also included in the amount "at risk" is the amount borrowed by the activity under certain enumerated circumstances.[3] Under Section 465, a taxpayer is considered "at risk" with respect to amounts borrowed for use in an activity to the extent that he is either personally liable for the repayment of such amounts or has pledged property, other than property used in the Partnership to the extent of the net fair market value of the taxpayer's interest in such property. These provisions are effective for taxable years beginning after December 31, 1976. Section 465(b). Excluded from borrowed amounts which may be considered "at risk" are amounts borrowed from any person who either: (1) has an interest (other than an interest as a creditor) in the partnership activity; or (2) has a relationship to the taxpayer specified within any one of the paragraphs of Section 267(b). Section 465(b)(3). An amount is not con-

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[3]The Revenue Act of 1978 has amended Section 465 to provide for the recapture of previously allowed losses where the amount at risk is reduced below zero. This recapture rule applies to losses which are allowed (and reduce the taxpayer's at risk basis in the activity) for taxable years beginning after December 31, 1978 .

Section 465(e), as amended, provides that if the amount at risk is reduced below zero (by distributions to the taxpayer, by changes in the status of indebtedness from recourse to nonrecourse, by the commencement of a guarantee or other similar arrangement which affects the taxpayer's risk of loss, or otherwise), the taxpayer will recognize income to the extent that his at risk basis is reduced below zero.

sidered "at risk" with respect to amounts protected against loss through guarantees, stop loss agreements or other similar arrangements. Section 465(b)(4).

The Code does not define what relationship is considered to create an "interest" in the partnership activity. However, the *General Explanation of the Tax Reform Act of 1976,* prepared by the staff of the Joint Committee on Taxation, states (p. 39) that such an interested person would include ". . . all other partners and any other person (such as a promoter or selling agent) who stands to receive financial gain from the activity or from the sale of interests in the activity."

The General Partner has represented to Special Tax Counsel that the partnership borrowings for which investors will become personally liable, will be made from an unrelated lender, that will not have any interest in the profits, capital, or property of the Partnership other than as secured creditor. The lender will be compensated only by the payment of interest, and neither the General Partner nor any of its affiliates will guarantee the liability, or otherwise compensate the lender. The General Partner further represents that the lender will not be a promoter or selling agent of the limited partnership interests herein; and that the lender does not stand to receive financial gain from the activity or from the sale of interests in the activity (other than interest income earned by the lender on the loans to the partnership). Relying on these representations, the lender should not be considered an "interested person" under Section 465(b)(3)(A).[4]

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[4]We do note, however, that since Section 465 was only recently enacted, the "interested person" language may subsequently be clarified by Treasury Regulations, Rulings or Judicial decisions. If any of these are inconsistent with the interpretation given these terms by the *General Explanation of the Tax Reform Act of 1976,* Special Tax Counsel's opinion in this regard may accordingly be modified.

The investor should be "at risk" in the current and two succeeding fiscal years for the amount of cash actually contributed by him in each respective year. Section 465(b)(1)(A). Further, the investor should be "at risk" for the amount of partnership borrowings used in the partnership activity for which he is personally liable for repayment; provided that sufficient amounts are borrowed, the loans are on a *bona fide* basis; and that these borrowings meet the tests of Section 465(b)(1)(B) and 465(b)(2).[5]

The Partnership will purchase all of its horticultural products from Island Foliage, Inc., an independently owned company. Island Foliage, Inc. will receive payment in full from the Partnership during the current year. Because of existing customary trade practice, Island Foliage, Inc. will not make full payment to the growers (e.g. its own suppliers of horticultural products) at the time the contract is executed. Instead, payment will be extended as is common in trade practice.

As partial consideration for the sale of horticultural products to the Partnership, Island Foliage has agreed that upon request by the Partnership, it will deposit certain collateral, generated from the excess cash produced in the sale to the Partnership, with the entity lending funds to the Partnership (or with another entity loaning funds to the Partnership's lender). This is being done by Island Foliage to reduce the loan cost to the partnership.

The IRS may also claim that for tax purposes, Island Foliage, Inc. and the Partnership are the agents of one another. If this theory were applied, the IRS might contend that the purchase by Island Foliage, Inc. of horticultural items was, in substance,

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[5]It must be noted that should the Partnership fail to make the related payments to its creditors on the debts for which the Limited Partners will be personally liable, the Limited Partners may be held to be directly liable for the payment to the creditors.

made directly by the Partnership itself. The deductions allowable to the Partnership would be limited to the cash payments made by Island Foliage, Inc. to its own suppliers during the current year. Since these cash payments will be less than the amounts paid by the Partnership to Island Foliage, Inc. during the current year, the Partnership's deductions would accordingly be reduced. This would, however, amount only to a deferral of the deductions since under this theory the Partnership would be entitled to deductions in the subsequent year(s) when Island Foliage, Inc. paid the balance due to suppliers for horticultural items.

The IRS may contend that due to the close dependence of the partnership and Island Foliage on each other, the partnership cannot take deductions for horticultural items with respect to the amount of sales proceeds pledged or deposited by Island Foliage as described above. Such an argument might be based on either a "Substance" versus "form" theory or that the amounts pledged or deposited by Island Foliage do not constitute "borrowed amounts" under Section 465(b)(2) or (b)(3) of the Code. If this position were to be sustained, the investor's deductions in the current year would be limited to the amount of cash invested.

The opinion of Special Tax Counsel as to the deductibility of expenses is not binding upon the IRS. The IRS could disallow the deductions claimed by the Partnership, which could lead to the audit of the Limited Partners' individual income tax returns and the disallowance of Partnership losses and other deductions claimed herein.

Certain payments will be made to the General Partner for rendering management and administrative services to the Nursery and Tree Divisions. (See, "Summary of Limited Partnership Agreement — Management Fee.") The Partnership intends to deduct as guaranteed payments under Section 707(c)

of the Code these management fees. These deductions may be disallowed, in whole or in part, by the IRS. The Commissioner of Internal Revenue has identified the incorrect deduction of fees in tax shelter programs as a particular area of concern. The Service may challenge the deductibility of such fees on the grounds that they are expenses that should be capitalized rather than deducted from the current income of the Partners. The Service may also challenge the deduction of a portion of such fees as unreasonable compensation. Capitalization of management fees could be based on the theory that the fees constitute prepayments that materially distort income (either at the Partnership or Partner level), or that such payments do not constitute guaranteed payments under Section 707(c) of the Code, or that such payments are incurred in connection with the acquisition of a capital asset and therefore appropriately capitalized as part of the tax basis of such asset. The Service has experienced success in certain recent challenges in these areas. The Service prevailed in *Jackson E. Cagle, Jr.*, 63 T.C. 86 (1974), affirmed 539 F.2d 409 (5th Cir. 1976), in which the United States Tax Court held that a partnership and its partners could not deduct such payments and fees in the year in which paid to a general partner where such fees were actually capital expenditures.

The Tax Reform Act of 1976 confirms that guaranteed payments to partners must qualify as "ordinary and necessary business expenses" to be currently deductible and that no deduction shall be allowed to a partnership or any partner for the amounts paid or incurred to organize a partnership. The General Partner has represented that the management services which it provides are helpful in the conduct of the Partnership's business and that the amount thereof is reasonable in relation to the services provided. The General Partner has also represented that the services provided bear a reasonable relation to the number of units of Partnership interest that

are subscribed. Further, the General Partner has represented that the management fee does not relate to or constitute reimbursement for the organization expenses of the Partnership nor for selling the limited partnership interests.

The full amount realized by the Partnership upon the sale of cut flowers and plants will constitute ordinary income includible in determining each partner's distributive share of partnership income. Under some circumstances, even though the Limited Partners are required to recognize taxable income, the Partnership may not have cash available for distribution to the Limited Partners. In the event of foreclosure of the Partnership's plants and other property, the Limited Partner may have substantial tax liabilities as a result of their interest in the Partnership, and no cash distribution from the Partnership with which to pay such liabilities.

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December 12, 1979

Mr. Edward H. Heller
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Dear Mr. Heller:

Proposed "at risk" regulations have been issued by the Treasury Department. As of this date, final regulations have not been issued in final form.

The tax opinions for the "C" greenhouses, as previously issued by our firm during the current were prior to the release of the proposed regulations. They accordingly did not make reference to these proposed regulations. We have therefore modified our tax opinion so as to incorporate these proposed regulations.

The following should be inserted in our tax opinion, between paragraphs 2 and 3 on page 55 of the private placement memorandum.

On June 4, 1979 the Treasury Department issued proposed regulations relating to the "at risk" rules of Section 465. Final regulations have not been adopted by the Treasury Department.

With regard to Section 465(b)'s provision excluding from amounts "at risk", amounts borrowed from any person having an "interest", (other than an interest as a creditor) in the

partnership, proposed regulation Section 1.465-9(b)(1) provides that a lender shall be considered a person with an interest in the partnership activity other than that of a creditor "only if the lender has a capital interest in the activity or an interest in the net profits of the activity." Section 1.465-8(b)(2) defines "capital interest" as an interest in the assets of the activity distributable to the owner of the capital interest on liquidation of the activity. It also provides that the partners of a partnership are considered to have capital interests in the partnership activity. Section 1.465-8 (b)(3) provides that with respect to an interest in the net profits of the partnership activity, it is not necessary for a person to have incidents of ownership in the activity to have an interest in the net profits of the activity. This section gives, as an example an employee or independent contractor, any part of whose compensation is determined with reference to the net profits of the activity, as having an interest in the net profits of the activity.

Section 1.465-22(a) of the proposed regulations provide that a partner's amount "at risk" will not be increased by the amount which the partner is required under the partnership agreement to contribute "until such time as the contribution is actually made." This section also provides that a partner's amount "at risk" will not be increased by the amount of a note payable to the partnership for which a partner is personally liable "until such time as the proceeds of a note are actually devoted to the activity."

With regard to a liability incurred by the partnership in the conduct of a partnership activity, Section 1.465-24(2)(i) provides that only where under state law members of the partnership may be held personally liable for repayment of the liability will each partner's amount "at risk" be increased by his proportionate share of the liability, to the extent the partner is not protected against loss.

Section 1.465-1(b) provides that in applying Section 465 and the proposed regulations thereunder, substance will prevail over form and that a taxpayer's amount "at risk" will not be increased if the transaction "is inconsistent with normal commercial practices or is, in essence, a device to avoid Section 465."

Herein the loan proceeds, after being used by the partnership to purchase horticultural products from Island Foliage may be used as collateral in connection with a loan to be made by the partnership in order to purchase these products. In light of these proposed regulations, the IRS may claim that the partnership borrowings from an unrelated lender for which investors will be personally liable does not increase an investor's amount "at risk" because the loan transaction is "inconsistent with normal commercial practices and is, in essence, a device to avoid Section 465." Further the IRS may claim that the loan was not incurred in the conduct of a partnership activity since the proceeds may ultimately be pledged as security in connection with the loan, and not used in a farming activity.

If the proposed regulations are adopted in their present form, although each investor may be personally liable for repayment of the loan to the unrelated lender, if the loan is found to be inconsistent with "normal commercial practices" or to be "a device to avoid Section 465," or found not to be used in the "conduct of the partnership activity," then the deductions otherwise available during the current year would be decreased by the investor's proportionate share of the liability.

If the proposed regulations are adopted in their present form, the IRS may contend that the amount "at risk" is not increased by the investor's execution of the "promissory obligation agreement" (Exhibit E in the private placement memorandum). Under this agreement, the investor promises to pay the indebtedness incurred by the limited partnership business.

The amount of this obligation is set at a maximum rate, with the stated contingency that if the investor's pro-rata share of the indebtedness is less than the specified amount, then the investor's obligation likewise reduces. However, assuming no such reduction, the investor is required under the terms of the agreement to make payments of this principal amount together with interest to the partnership in a specified number of years.

Based on this agreement, the IRS may contend that (1) under Section 1.465-24(2)(i), the amount "at risk" is not increased because under applicable state law, the limited partners are not liable for repayment of partnerships liabilities by virtue of execution of this Agreement; (2) the amount "at risk" is not increased until some subsequent year when payments under the agreement are to be made.

Since the proposed regulations may, in fact, be adopted in final form, and this may have impact on the tax ramifications of any investment in the limited partnership, investors in any such partnership should be notified of this modification of our opinion as stated above.

/s/Stiller, Adler, Schwartz & Kaswell
STILLER, ADLER, SCHWARTZ,
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dd

Supreme Court, U.S.
FILED
JUL 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-2004 and 88-7439

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT M. ADLER, PETITIONER

v.

UNITED STATES OF AMERICA

EDWARD HELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order dismissing an indictment against them.

1. On July 26, 1984, petitioners were charged in an 11-count indictment returned in the United States District Court for the Southern District of Florida. The indictment charged both petitioner Heller, the promoter, and petitioner Adler, a lawyer, with five counts of mail fraud, in

violation of 18 U.S.C. 1341. Petitioner Heller was also charged with four counts of transporting fraudulently obtained property through interstate commerce, in violation of 18 U.S.C. 2314, and two counts of making false statements on his income tax returns, in violation of 26 U.S.C. 7201.

The charges against petitioners are described in the opinion of the court of appeals (Adler Pet. App. 2a-8a). Briefly, the indictment charged that between 1976 and 1979, petitioners devised a scheme to defraud investors and the Internal Revenue Service by creating and selling limited partnerships in a company that was ostensibly engaged in buying and selling shrubbery. The partnerships, if they had functioned as represented, would have generated tax deductions in excess of the cash contribution by each limited partner. The validity of the deductions depended in part upon the validity of a series of monetary transactions on December 17, 1979, including loans made to the partnership by Fin Serve, an entity under petitioner Heller's control. Clariden Bank of Zurich, Switzerland, loaned the cash to Fin Serve that Fin Serve loaned to the partnerships. If the loans lacked economic substance, the limited partners' claimed deductions would not be respected for tax purposes.

On January 20, 1987, the district court dismissed the five mail fraud counts and three of the fraudulently obtained property counts following an evidentiary hearing at which several Swiss and American banking experts testified. Pet. App. 20a-33a. The court found that, as a matter of Swiss banking law, the loans from Clariden Bank to Fin Serve were real and not fictitious and that the funds that circled among the parties on December 17, 1979, were not fictitious but real. Accordingly, the district court concluded that as a matter of law the allegations of the indictment could not be proved. Alternatively, the district court

ruled as a matter of law that neither petitioner could have formed the requisite criminal intent, because the absence of any Internal Revenue Service statement or court opinion condemning similar schemes and the conflicting opinions of tax experts demonstrated legal uncertainty as to the tax consequences of the scheme.

2. The court of appeals reversed (Adler Pet. App. 1a-15a), concluding that the district court's findings about Swiss banking law were irrelevant to the legal sufficiency of the indictment. The court held that the indictment adequately alleged that petitioners sought to defraud the limited partners and the Internal Revenue Service by representing that the Fin Serve loans could enable the partners to realize a tax benefit, and that a jury could find that petitioners defrauded the partners and the Service if they found that this representation was baseless. The court also ruled that petitioners could have formed the requisite criminal intent.

3. Petitioner Adler contends (Adler Pet. 17-25) that the court of appeals erred because his written tax opinion about the shelters was correct as a matter of law and because legal uncertainty about the pertinent law makes it impossible to infer that he issued the opinion with fraudulent intent. Petitioner Heller contends (Heller Pet. 9-17) that the indictment violates his right to due process of law because the applicable tax law was so vague that he could not have the requisite intent to violate the law. Whatever the merits of petitioners' contentions they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motions to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will be able to raise their

current contentions, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

JULY 1989

* Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petitions. We will file a response on the merits if the Court requests.

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699:00341

Supreme Court, U.S.
FILED
AUG 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

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IN THE

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OCTOBER TERM, 1988

ROBERT M. ADLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO OPPOSITION OF UNITED STATES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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REPLY TO OPPOSITION OF UNITED STATES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The United States sought appellate consideration of the issues in this case by the Eleventh Circuit Court of Appeals pursuant to 18 U.S.C. § 3731. Now it urges that the judgment of the court of appeals should be equated with an interlocutory decision of a district court denying a motion to dismiss an indictment, which may be mooted by a defendant's acquittal at trial or consolidated with all other issues on appeal from a final judgment. (United States Opp. 3-4).

The approach of the United States is flawed in the following respects.

First, general principles concerning appellate review of interlocutory orders of district courts are not pertinent. Petitioner seeks review of the judgment of the court of appeals, not an interlocutory order of a district court. That court of appeals' judgment accompanies a published opinion which is binding precedent in the Eleventh Circuit and which establishes a present and persistent conflict with the decision of the Fourth Circuit in *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), and the decision of the Fifth Circuit in *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc). Neither the precedential value of the court of appeals' decision in this case nor the split it creates within the circuits can be mooted by any later development in the district court.

Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988), is directly relevant. In *Bank of Nova Scotia*, the district court dismissed an indictment as to the Bank of Nova Scotia before trial. Upon an appeal by the United States pursuant to 18 U.S.C. § 3731, as in this case, the court of appeals held in favor of the United States and reversed, reinstating the indictment and remanding for trial. *United States v. Kilpatrick*, 821 F.2d 1456, 1475 (10th Cir. 1987). This Court granted the writ of certiorari to review the judgment of the court of appeals, notwithstanding the possibility that trial would moot the claims of the Bank of Nova Scotia. *See Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494 (1989) (certiorari granted to review court of appeals' dismissal of interlocutory appeal of denial of motion to dismiss and remand for a trial that could have mooted appellate issue in event of acquittal); *cf. Michael v. United States*, 454 U.S. 950, 951-52 (1981) (White, J., dissenting from denial of certiorari to review court of appeals' judgment reversing suppression of evidence). Petitioner herein

is no less entitled to certiorari review by the possibility of later acquittal than were the petitioners in *Bank of Nova Scotia*.

Second, petitioner requests certiorari to determine whether a defendant in his circumstances is entitled to a judicial determination, before trial, of controlling legal issues which require dismissal of the indictment. Inherent in the questions presented for review, therefore, is the right to a pretrial ruling dismissing an indictment. If review of those questions is delayed until after a trial, no further review can grant this petitioner the right not to be placed in jeopardy. *See Abney v. United States*, 431 U.S. 651 (1977).

Third, this Court grants certiorari to review interlocutory judgments where the issue involved is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947). Petitioner's contention that this prosecution is controlled by legal principles to be decided by a court, not a jury, plainly is fundamental to the further conduct of the case. It is fundamental in a way that a contention concerning the suppression of certain evidence would not be. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (certiorari review of court of appeals' denial of mandamus to compel district court to try case to a jury and not to the court alone).

Finally, the importance of the questions presented make them worthy of review at this time. *See Estelle v. Gamble*, 429 U.S. 97 (1976) (certiorari review of court of appeals' reversal of dismissal of complaint). Tax lawyers must counsel with clients every day concerning unclear legal questions. If the legal advice has a reasonable basis or the law is unclear, a lawyer would not heretofore have expected to be subjected

to criminal prosecution. Courts permit experts to debate their opinions on many issues, but our system traditionally has recognized that judges tell the jury what the law is. If juries will decide questions of tax law, and if criminal liability can be asserted as to advice on unclear and debatable legal issues, conscientious representation by tax lawyers of their clients will be chilled. It will not matter what a jury decides concerning petitioner's opinion in this case; the decision of the court of appeals will place tax lawyers at risk of being right or going to jail.

Respectfully submitted,

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